Nos. 730-738

In the Supreme Court of the United States

OCTOBER TERM, 1941

FERDINAND A. KIRCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1943

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FERDINAND A. KERTESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 416–428) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on January 25, 1944 (R. 429–432). The petition for writs of certiorari was filed on February 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Rules

of Criminal Procedure promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether exportation of "platinum group" metals under another's license, procured from the Secretary of State by false representations as to the seller and the destination of the metals, is a violation of Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701).

2. Whether the evidence was sufficient to sustain petitioner's convictions.

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701), in pertinent part provides:

> Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than

> $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.[1] * * *

Proclamation No. 2413 (5 Fed. Reg. 2467) promulgated by the President on July 2, 1940, pursuant to the Act of July 2, 1940, provides in part:

> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of Congress, do hereby proclaim that the administration of the provisions of section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.
>
> And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided:
>
> * * * * *
>
> 2. The following basic materials and products containing the same:
>
> * * * * *

[1] On June 30, 1942, the statute was amended in respects not here material (c. 461, 56 Stat. 463; 50 U. S. C. App., 1942 Supp., 701).

q. Platinum group metals.

* * * * *

And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control.

* * * * *

The Regulations prescribed by the President on July 2, 1940 (5 Fed. Reg. 2469), governing the exportation of articles and materials designated in the proclamation, provide in pertinent part:

* * * I hereby prescribe the following regulations to govern the exportation of:

* * * * *

q. Platinum Group Metals.

* * * * *

2. None of the articles or materials listed above shall be exported unless a license authorizing such export has been issued by the Secretary of State. * * *

3. The Secretary of State will issue export licenses to authorize proposed

shipments of the said articles and materials * * * when I have determined that the proposed exportation would not be detrimental to the interests of the national defense.

* * * * *

6. Export licenses are not transferable and are subject to revocation without notice. If not revoked, licenses are valid for one year from the date of issuance.

* * * * *

9. The country designated on the application for license as the country of destination shall in each case be the country of ultimate destination. If the goods to be exported are consigned to one country with the intention that they be transshipped thence to another country, the latter country shall be named as the country of destination.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Four separate indictments (R. 12–20) were returned, in the District Court of the United States

for the Southern District of New York, charging petitioner with two separate violations of, and with having entered into two separate conspiracies to violate, Section 6 of the Act of July 2, 1940 (*supra*, pp. 2–3) and the Executive Proclamation and regulations issued thereunder (*supra*, pp. 3–5). All four indictments are concerned with the exportation, without an export license, of one or more of the metals known as rhodium, iridium, and palladium.[2] The Chemical Marketing Company, Inc., all of whose shares were owned by petitioner at the time of the transactions charged, was named as a codefendant in all of the indictments; and it has entered pleas of *nolo contendere*[3] and has been fined $2,500 on each indictment (R. 4–11, 285–288). The first of the conspiracy indictments (R. 13–16) named as additional defendants Theodore C. Barth, of Cali, Colombia, Deutsche Gold und Silber Scheideanstalt, a Ger-

[2] All of these metals are "platinum-group" metals (R. 86). Rhodium is used in wartime primarily in the form of platinum-rhodium catalyst for the manufacture of nitric acid, which in turn, is used in the manufacture of explosives. Iridium is used primarily in electric contact points for motors. Palladium is used as a catalyst in various hydrogenation processes. (R. 134–135.) Since July 2, 1940, when the export control program became effective, no licenses permitting the exportation of these metals to Axis countries have been issued (R. 91).

[3] The circumstances under which the *nolo* pleas were entered, following the vesting of the corporation's shares in the Alien Property Custodian, were before this Court in *Kertess* v. *United States*, No. 1029, last Term, certiorari denied, 319 U. S. 773.

man corporation, and Leukon A. G., a Swiss corporation. Of these Barth was the only one not named in the second conspiracy indictment (R. 18–20), which also named as defendants one Betty Mueller, alias Anna Babette Mueller, one Herbert Lickfett, and G. Siebert G. m. b. H., a German corporation. None of these parties being within the jurisdiction of the court, petitioner went to trial alone, after a consolidation of the four indictments for trial (R. 22). He was found guilty by the jury on each indictment (R. 5, 7, 9, 11, 281) and was sentenced on each to a $1,000 fine and to eighteen months' imprisonment, the sentences to run consecutively (R. 5, 7, 9, 11, 396). Upon consolidated appeals to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were unanimously affirmed (R. 416–432). The evidence of the transactions charged in the indictments may be summarized as follows:

A. *The Barth transaction.*—The circumstances upon which the first substantive and the first conspiracy indictment (R. 12–16) were predicated were designated by the court below as the "Barth transaction." Petitioner, in addition to being the president and sole shareholder of the Chemical Marketing Company, Inc., was the New York representative of Deutsche Gold und Silber Scheideanstalt (R. 220, Gov. Ex. 67, R. 338–339), with which G. Siebert G. m. b. H., another German corporation, and Leukon A. G., a Swiss corpora-

tion, were affiliated (see R. 135–136, 138–139, 220, 221–222, 224). On October 22, 1940, Leukon A. G. cabled petitioner from Switzerland for quotations on 15 ounces of rhodium, 15 ounces of iridium, and 150 ounces of palladium, with delivery to be made to Barth in Colombia (R. 294). The same day petitioner replied that he had informed Barth, and on October 29 he cabled Leukon the requested quotations, asking payment by cable to the Irving Trust Company (R. 295). Leukon A. G. promptly paid in advance, on October 31 (R. 297); and on that day a sale of the metals to Leukon A. G. was entered on the books of Chemical Marketing Company (R. 221), although the metals in question had not yet been procured by the latter or by petitioner.

In the meantime petitioner had discussed with the government witness Heemsoth, a customs broker, the contemplated shipment of the metals to Barth in Colombia. He asked Heemsoth to make arrangements whereby applications for export licenses would be made by Paul Gross, in the name of Western Commercial Company of which he was president, and whereby Gross was to be furnished with money with which to buy and ship the metals in the name of Western Commercial, which was to receive payment for them, all to the end that petitioner would not appear in the transaction. (R. 59–61, 176–181.) Pursuant thereto export licenses, covering 15 ounces of rhodium, 15 ounces of iridium, and 150 ounces of palladium, were procured in the name of Western Commer-

cial (R. 61–64, Gov. Ex. 48, R. 313–322). The applications for the licenses stated that Western Commercial was the consignor and seller, that the purchaser was Barth of Colombia, and that the licenses were to be sent to Heemsoth (Gov. Ex. 48, R. 313–317; Gov. Ex. 49, R. 318–322; see also Gov. Ex. 50, R. 323). The licenses were dated October 23, 1940, purported to authorize export only by the applicant, and expressly provided that they were not transferable (R. 316, 317, 321).

Thereafter Gross and Western Commercial withdrew from the arrangement whereby the latter was to purchase the metals and act as shipper, apparently because the necessary funds had not been placed at their disposal (R. 64, 71). Petitioner purchased the metals directly (see R. 75–76, 79, 80–81, 83–85; Gov. Ex. 31, R. 298; Gov. Ex. 33, R. 299; Gov. Ex. 34, R. 300; Gov. Ex. 39, R. 304) and procured from Heemsoth the licenses that had been issued to Western Commercial[4] (R. 64, 66). Reputable dealers, in selling platinum group metals, customarily made inquiries to ascertain that they were to be used in this country (R. 81); and in purchasing the rhodium and iridium petitioner did not state that a license had been issued for their exportation but represented that they were not being purchased for export (R. 77). He completed his purchase

[4] Gross and Western Commercial had never taken possession of the licenses, which had been delivered to Heemsoth; there was no attempt to assign them; and the State Department was not notified that Western Commercial did not intend to use them (R. 174).

of the metals on November 8 (R. 83, 84), and shipped them on November 19 by air express to Miami (Gov. Ex. 56, R. 325) and from there by Pan American Airways to Barth in Cali, Colombia (R. 109, 112), using the licenses of Western Commercial Company to clear the shipment at the port of exit (R. 104, Gov. Ex. 57, R. 326–328).[5] On the same day he advised Leukon A. G., by letter, of the shipment (Gov. Ex. 42, R. 308). The records of the Railway Express Agency and the airway bill stated that Western Commercial Company was the shipper (R. 109, 325), and the export declaration stated that the shipment was invoiced by Western Commercial (R. 326). Since the latter was the licensee, it was only by representing that the shipment was invoiced by Western Commercial that it was possible to clear it at the port of exit, where the licenses, which accompanied the shipment, were checked against the export declaration by the deputy collector of customs (R. 104). Heemsoth's firm prepared the shipping documents and charged Chemical Marketing Company $9.75 for its services (R. 307). The licenses were then returned to the Department of State (R. 105). The metals were received by Barth, who reshipped them via Santiago, Chile, to Europe, consigned to G. Siebert G. m. b. H. (Gov. Ex. 65–A, R. 334–335). Petitioner later referred to these shipping

[5] The files of the Office of Economic Warfare, which has succeeded to the State Department's functions in this respect, show that no application for an export license was made by either petitioner or Chemical Marketing Company and that no license was ever issued to either (R. 91).

methods as "a damned clever performance," and warned his German principals not to jeopardize their continuance by incautious cables (R. 336–337).

B. *The Mueller transaction.*—The circumstances upon which the second substantive and the second conspiracy indictment (R. 17–20) were predicated were designated by the court below as the "Mueller transaction." With funds supplied indirectly by Deutsche Gold und Silber Scheideanstalt (R. 221–222), petitioner bought 60 ounces of iridium in June 1940, representing that it was for domestic use (Gov. Ex. 69, R. 342; Gov. Exs. 70–A, 70–B, 70–C, R. 343–344). Pursuant to directions he mailed the metal to the German concern's transshipping agent in Japan (R. 156, Gov. Ex. 77, R. 345), but it was returned on January 22, 1941, with a notation that the import regulations of Japan did not permit its entry (R. 162, Gov. Ex. 92, R. 351; Gov. Ex. 93, R. 352). Thereafter he conducted negotiations with Barth, concerning ways and means to export the metal, which culminated in an attempt to export it to Mexico by having Western Commercial Company again apply for an export license (R. 166–171, 172–173; Gov. Ex. 95, R. 354–355; Gov. Ex. 96, R. 356; Gov. Ex. 97 and 97A, R. 357–358). An application for such a license was denied by the Department of State February 27, 1941, on the ground that the exportation would not be in the interest of national defense (Gov. Ex. 88, R. 349; Gov. Ex. 98, R. 362).

On the same day one Betty Mueller, of 1812 Cornelia Street, Brooklyn, bought a steamship ticket, costing $119.75 and covering passage to Spain on the S. S. Magallanes sailing March 26 (Gov. Ex. 109, R. 377). The government witness Krist, petitioner's secretary (R. 39–40), identified two documents which petitioner had given her in June 1942, and which until then he had kept at his home, apart from his office files (R. 159). One was a notation that Betty Mueller was sailing on the S. S. Magallanes, and the other was a written acknowledgement by her dated March 24, 1941, of receipt from the Chemical Marketing Company of 35 ounces of rhodium "for special delivery" (R. 212, Gov. Ex. 90, 350). In the meantime, on March 21, petitioner had paid to the Irving Trust Company an amount sufficient to release 35 of the 60 ounces of rhodium that he had pledged to it on January 25, 1941 (R. 192), and, likewise on March 21, he had debited Leukon A. G. for $250 expended in connection with rhodium (R. 225) and had sent a Swedish affiliate a debit memorandum to that effect (Gov. Ex. 87, R. 348), receipt of which was later acknowledged by Deutsche Gold und Silber Scheideanstalt (Gov. Ex. 104, R. 373). Betty Mueller sailed on the S. S. Magallanes on March 26 to Spain enroute to Germany, whence she subsequently wrote to the government witness Liebert (R. 204–205). No license to export the 35 ounces of rhodium had been obtained (R. 176–177). In June of 1942, when petitioner was called

upon by Murray, an Internal Revenue Agent, to explain his transactions in rhodium, entries were made on the books of Chemical Marketing Company, dated back to December 31, 1941, showing the shipment of the 35 ounces to Leukon A. G. on March 24, 1941, and debiting it with the price thereof (R. 224–225). At the same time, in June of 1942, petitioner executed an affidavit stating that Betty Mueller had "identified herself with a letter of G. Siebert, which communication requested her to call on the corporation [Chemical Marketing] and to collect from the corporation the thirty-five ounces of Rhodium metal," which were delivered to her on March 24, 1941 (R. 212, Gov. Ex. 93, R. 352–353).

ARGUMENT

I

Petitioner contends (Pet. 13) that, under Section 6 of the Act of July 2, 1940 (*supra,* pp. 2–3) and the regulations issued thereunder (*supra,* pp. 4–5), the issuance of an export license is tantamount to a determination that the metals authorized thereby to be exported are not essential for national defense, and that therefore "the subsequent act of exportation cannot reasonably be construed as a violation of the Law, no matter who participates therein." The purport of the argument is that falsification of the identity of the licensee and of the destination of the commodities is irrelevant and therefore not a violation of

the Act. But the Act and the regulations were not intended to do so vain a thing as to make the issuance of a license conclusive disproof of the need of one. The purpose of the Act was not to prohibit altogether the exportation of materials covered by it, but to allow their exportation only under circumstances compatible, in the judgment of the President, with the interests of national defense. It is well known that the defense legislation, enacted between the outbreak of war in Europe and Pearl Harbor, was not motivated by fear of the world at large and was not intended to preclude trade with all foreign nations. There is, therefore, no basis for petitioner's contention that, under the Act of July 2, 1940, the President has no power "to consider, as the basis for any determination, the nature of the shipper or the ultimate destination of the materials" (Pet. 12). Such factors are clearly within the standard of delegation; and the delegation is clearly valid. *United States* v. *Curtiss-Wright Export Corporation,* 299 U. S. 304.

II

Petitioner does not challenge the sufficiency of the evidence to establish the Barth transaction, but contends (Pet. 15–19) that his admissions respecting the Mueller transaction were not sufficiently corroborated. In so doing he treats as admissions the entries in the account books of the Chemical Marketing Company (Pet. 15). But these were

admissible in evidence as business entries in the books of the corporation, rather than as admissions by petitioner. Mrs. Mueller's receipt for the rhodium, and the paper previously in petitioner's possession showing his knowledge that she was sailing on the S. S. Magallanes, were independently proved by the witness Krist (R. 159). The fact that she sailed as planned, and reached Germany, was likewise independently proved (*supra,* p. 12). Wholly apart, therefore, from the admissions contained in petitioner's affidavit given Murray in June 1942 (R. 352–353), the evidence was amply sufficient to prove the exportation by petitioner of the 35 ounces of rhodium without an export license, and left nothing for conjecture, presumption, or surmise. It follows that the question of the extent to which an admission, made after the commission of the crime but prior to the time the accused has been charged therewith, requires corroboration, cf. *Warszower* v. *United States,* 312 U. S. 342, 347, is not presented by this case. For, as the court below found after a detailed review of the evidence (R. 426–427), irrespective of the rule followed, there was ample collaboration here. Indeed, it is the admissions that are corroborative of other evidence independently sufficient to sustain the verdict under the Mueller indictments.

Petitioner also contends (Pet. 14–15, 19–21), with respect to both of the conspiracy indictments, that the evidence fails to show that he conspired

with anyone. We submit that the evidence set forth in the Statement (*supra*, pp. 7–13) amply shows that in connection with the Barth transaction he conspired with Barth, with Heemsoth,[6] and with his foreign principals; and that, in connection with the Mueller transaction, he conspired with Mrs. Mueller and his foreign principals.[7]

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants further review. It is therefore respectfully submitted that the petition should be denied.

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MARCH 1944.

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[6] Petitioner is clearly in error in stating (Pet. 14) that Heemsoth's only connection with the Barth transaction was the procuring of the export licenses. See pages 8–10, *supra*, in the Statement.

[7] Petitioner does not contend that there was but a single conspiracy of which both the Barth and Mueller transactions were in furtherance. Prior to February 27, 1941, the only conspiracy shown by the evidence was one to export metals under export licenses issued in the name of another; on February 27, 1941, or soon thereafter, a second conspiracy was formed to export metals by personal messenger.

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